

# Obstacles Faced by the Elderly Veteran

Craig M. Kabatchnick

*North Carolina Central University School of Law*

Follow this and additional works at: <http://scholarship.law.marquette.edu/elders>



Part of the [Elder Law Commons](#)

---

### Repository Citation

Kabatchnick, Craig M. (2010) "Obstacles Faced by the Elderly Veteran," *Marquette Elder's Advisor*: Vol. 12: Iss. 1, Article 9.  
Available at: <http://scholarship.law.marquette.edu/elders/vol12/iss1/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Elder's Advisor by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## OBSTACLES FACED BY THE ELDERLY VETERAN IN THE VA CLAIMS ADJUDICATION PROCESS

Craig M. Kabatchnick\*\*

---

\* Professor Craig M. Kabatchnick is Director of the Veterans Law Program at North Carolina Central University School of Law, where he teaches Veterans Law Clinic I & II. From 1984 to 1990 he practiced with his father Neil B. Kabatchnick, before the Boards for Correction of Military Records within the various military departments in matters involving administrative military personnel law. He co-authored an article entitled, *Practice Before the Boards for Correction of Military Records Within the Various Military Departments*, Federal Bar News & Journal, January 1986, Vol. 33, No. 1, pages 17-21, 44 [cited as a reference in 10 U.S.C.A. 1552a]; Professor Kabatchnick represented the United States Department of Veteran Affairs from 1990 to 1995 as an Appellate Attorney, Senior Appellate Attorney and Associate Special Assistant on the Appellate Litigation Staff Group, Office of the General Counsel, United States Department of Veterans Affairs before the United States Court of Appeals for Veterans Claims in over 300 cases. From 1995 to present he has advocated for veterans rights and played a critical role in the VA claims adjudication process. Professor Kabatchnick has written two other articles for the Marquette Elder's Advisor: *PSTD and Its Effects on Elderly, Minority, and Female Veterans*, 10 MARQ. ELDER'S ADVISOR L.J. 269-308 (2009); and *The TBI Impact: The Truth About Traumatic Brain Injuries and Their Indeterminate Effects on Elderly, Minority, and Female Veterans of All Wars*, 11 MARQ. ELDER'S ADVISOR L.J. 81-104 (Fall 2009). The research in this article is attributed to Professor Craig M. Kabatchnick and the hard work, brilliance and dedication of his legal research assistant, Rachel L. Espey.

Also contributing research to this article are the following law students of the North Carolina Central University School of Law Veterans Law Program: Ashley Nicole Pressly, LaQuanda Tysinger, Andrew Stevenson, Andre McDavid, Billie Jo Guthrie, Stephanie Smith, Wale Ibrahim, all of whom contributed to the drafting of the article under direct supervision and guidance of Professor Kabatchnick.

This article is dedicated to my father, Neil B. Kabatchnick who

*"The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened by their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. **Never in the field of human conflict was so much owed by so many to so few.**"*

*-Winston Churchill (1940)*

## INTRODUCTION

Elderly veterans are continually facing particularly difficult obstacles when filing claims with the Department of Veterans Affairs (VA). "The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."<sup>1</sup> For the purpose of this article, an elderly veteran encompasses any veteran who fought during the Korean War or during World War II. Elderly veterans are encountering specific obstacles with the VA process because "[m]any veterans don't realize [the] benefits . . . available to them. [Veterans] come home from their tour of duty, and they no longer associate themselves with the veterans' community. Some [veterans] wait 50 years before they seek out VA benefits."<sup>2</sup> The time lapse between service and the time the veteran attempts to claim benefits only intensifies the obstacles the veteran will encounter.

The most significant obstacles encountered by elderly veterans are: (1) lack of transportation; (2) lack of buddy statements; (3) length of time it takes to complete the claims adjudication process; (4) lack of knowledge about potential

---

was a patriot, WWII Navy Veteran, and devoted his life to protecting the rights of active duty and reserve military personnel before the Boards for Correction of Military Records within the various military departments.

1. 38 U.S.C. § 101(2) (2006).

2. Valerie Jablow, *Representing Veterans in the Battle for Benefits*, 42 TRIAL 30, 30 (2006).

benefits; (5) lack of service records; and (6) lack of due process provided to claimants. This article will first provide a brief overview of the complex filing procedures at the Department of Veterans Affairs and analyze each of the obstacles facing the elderly while attempting to provide a remedy.

### OVERVIEW OF THE VA CLAIMS ADJUDICATION PROCESS

The United States Department of Veterans Affairs (VA) has an exhaustive, arduous, and comprehensive claims adjudication process by which benefits are awarded to a veteran (claimant).<sup>3</sup> In order to be eligible for disability compensation, the veteran must be disabled as the result of personal injury or disease, while in active service if the injury or the disease was incurred or aggravated in a line of duty.<sup>4</sup> First, a claimant will initiate a claim by filing a formal or informal claim with the VA Regional Office in the state in which the claimant resides.<sup>5</sup> The VA Regional Office makes a decision and mails notice of its decision to the claimant. The VA Regional Office's decision will include an initial rating decision.<sup>6</sup> The initial rating decision establishes the following: "(i) service connection for the death of the person from whom such eligibility is derived or (ii) the existence of the service-connected total disability permanent in nature."<sup>7</sup> When making the initial rating decision, the Rating Officer has a duty to consider "all evidence and material of record and applicable provisions of law and regulation."<sup>8</sup>

Once the claimant receives this initial rating decision (ranging from 0%-100%), the claimant has one year to begin the appeals process.<sup>9</sup> To begin the appeals process, the claimant

---

3. See generally ERIN MULHALL & VANESSA WILLIAMSON, RED TAPE: VETERANS FIGHT NEW BATTLES FOR CARE AND BENEFITS (2010), available at [http://issuu.com/iava/docs/redtape\\_2010](http://issuu.com/iava/docs/redtape_2010).

4. 38 U.S.C. § 1110.

5. 38 C.F.R. § 3.155(a), (c) (2009).

6. See 38 U.S.C. § 5113.

7. § 5113(3)(c).

8. 38 U.S.C. § 7104(a).

9. 38 U.S.C. § 7105.

must file a Notice of Disagreement at the VA Regional Office located in the state in which the claimant currently resides.<sup>10</sup> Several states have more than one VA Regional Offices. It is at this stage of the VA claims adjudication process that the claimant has the option of having a *de novo* review of the claim by a Decision Review Officer.<sup>11</sup> If the Decision Review Officer denies the claim or the claimant does not want to have the case viewed by a Decision Review Officer, the VA Regional Office will mail a Statement of the Case explaining the reasons for the denial of the claim.<sup>12</sup> After receiving the Statement of the Case, the claimant has to perfect the appeal by filing a VA Form 9 within sixty days from the date the Statement of the Case is issued or the remainder of the one year period from the date of the Regional Office's notice of its decision, whichever period ends later.<sup>13</sup> If the claimant fails to file a notice of disagreement within this one year time period, "the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with [U.S.C. Title 38]."<sup>14</sup> After the Substantive Appeal is filed, the case is transferred to the Board of Veteran's Appeals (BVA), which after an opportunity for a hearing and presentation of additional evidence is afforded to the claimant, the BVA renders a decision.<sup>15</sup>

After the BVA decision, the claimant must decide if they want to appeal the decision to the U.S. Court of Appeals for Veterans Claims (CAVC),<sup>16</sup> file a motion with the BVA for reconsideration or to vacate the BVA decision,<sup>17</sup> file a claim for revision of the BVA decision based on clear and unmistakable error (CUE),<sup>18</sup> file a reopened claim at the VA Regional Office

---

10. *Id.*

11. 38 C.F.R. § 3.2600 (2009).

12. 38 U.S.C. § 7105(d).

13. *Id.* § 7105.

14. *Id.* § 7105(c).

15. *Id.* § 7104.

16. *Id.* § 7292.

17. *Id.* § 7103.

18. *Id.*

based on new and material evidence,<sup>19</sup> or simply abandon any further steps and give up the claim.

Clear and unmistakable error (CUE) in a previous final Regional Office (RO) decision is considered an original claim rather than a reopened claim based on newly discovered evidence, which, when considered by the VA Regional Office *de novo* with the other evidence of record, could change the outcome of the claim. The U.S. Court of Appeals for Veterans Claims (CAVC) has stated that a claim of clear and unmistakable error (CUE) in a prior decision “is not being reopened. It is being revised to conform to the ‘true’ state of the facts or the law that existed at the time of the original adjudication.”<sup>20</sup> Revision of a prior final VA rating board decision based on clear and unmistakable error allows a veteran to receive an earlier effective date for the receipt of compensation or pension benefits based on the original date for the initial filing of the veteran’s claim for VA compensation and pension benefits.<sup>21</sup> Whereas, the problem with filing a reopened claim based on new and material evidence at the VA Regional Office level is the fact that the newly established effective date for benefits is considered to be the date of filing of the reopened claim based on new and material evidence.<sup>22</sup> A VA rating board decision which reverses or revises a prior VA rating board decision at the regional office level as a result of clear and unmistakable error “has the same effect as if the decision had been made on the date of the prior [initial VA rating] decision” at the VA Regional Office level, meaning that a claimant’s effective date would be the date that would have been given to the previously denied claim (that had clear and unmistakable error in it) had it been granted instead of denied.<sup>23</sup> When a previous final denial of service connection is revised because of a successful clear and unmistakable error

---

19. 38 U.S.C. § 5108.

20. *Russell v. Principi*, 3 Vet. App. 310, 313 (1992).

21. 38 U.S.C. § 5109A(a),(b).

22. *Id.* § 5110(i).

23. *Id.* § 5109A.

claim, service connection is "protected" even though service connection was only recently assigned, absent a showing of fraud or a showing that the veteran did not have the required military service or character of discharge.<sup>24</sup>

Specifically, there is no time limit for requesting that a previous final decision be reviewed for clear and unmistakable error; such a request may be made at any time in the VA claims adjudication process, even decades after the initial VA rating decision had become final. A clear and unmistakable error claim is subject to the same procedures as any other claim (that is, the denial of a CUE claim can be appealed to the BVA and to the CAVC). The VA duties to notify and assist, as set forth in the Veterans Claims Assistance Act of 2000 (VCAA), are not applicable to CUE claims.<sup>25</sup>

As such, there is a "pleading" requirement in pursuing a claim for clear and unmistakable error at all stages of the VA claims adjudication process. The veteran or his representative must raise the issue of clear and unmistakable error to the VA with great detail and specificity as to when and how the CUE occurred.<sup>26</sup> In 2002, the Court of Appeals for the Federal Circuit affirmed a decision of the Court of Appeals for Veterans Claims, holding that it did not have jurisdiction to consider a claim for clear and unmistakable error that was raised for the first time before the Court of Appeals for Veterans Claims.<sup>27</sup>

Therefore, in filing a claim for reversal of a prior VA rating decision based on clear and unmistakable error, it is not enough for a veteran to state simply that the VA Regional Office rating board was somehow wrong in its initial adverse prior rating decision; instead, a detailed argument identifying the clear and

---

24. *Id.*; 38 C.F.R. § 3.957 (2009).

25. *See, e.g.,* *Livesay v. Principi*, 15 Vet. App. 165, 179 (2001) (holding that the VA's duties to assist and notify found in the VCAA are not applicable to a CUE motion.); *Huston v. Principi*, 17 Vet. App. 195, 206 (2003); *Parker v. Principi*, 15 Vet. App. 407, 412 (2002).

26. *E.g.,* *McIntosh v. Brown*, 4 Vet. App. 553, 561 (1993); *Sondel v. West*, 13 Vet. App. 213, 216 (1999) (citing *Crippen v. Brown*, 9 Vet. App. 412, 420 (1996); *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993)).

27. *Andre v. Principi*, 301 F.3d 1354, 1363-64 (Fed. Cir. 2002).

unmistakable error is essential for the veteran to prevail in a claim based on clear and unmistakable error with a prior final adverse VA rating decision. In *Simmons v. Principi*, it was held that if a claimant fails to meet the pleading requirements in filing a claim based on clear and unmistakable error either regarding a final BVA decision or a final initial VA Regional Office rating decision, the veteran's overall claim will be dismissed without prejudice (meaning that the veteran can submit another claim based on clear and unmistakable error in the future and the fact that a prior clear and unmistakable error claim was dismissed will not be held against the veteran).<sup>28</sup>

In *Andrews v. Nicholson*, the United States Court of Appeals for the Federal Circuit held that the duty to "fully and sympathetically" develop a veteran's pro se motions to reverse the prior adverse VA rating decision based on clear and unmistakable error does not apply to pleadings filed by legal counsel.<sup>29</sup> In this regard, in *Robinson v. Shinseki*, the United States Court of Appeals for the Federal Circuit held that the duty to read pleadings sympathetically applies to both regular benefits claims and clear and unmistakable error claims, and that the duty does not apply if a lawyer represents the claimant on the clear and unmistakable error claim (the duty to read pleadings sympathetically does apply if the veteran has appointed an attorney to represent the veteran in filing on a non-clear and unmistakable error claim).<sup>30</sup>

In *Comer v. Peake*, the United States Court of Appeals for the Federal Circuit held that assistance from a service organization representative is not the equivalent of legal representation.<sup>31</sup> On the other hand, when the veteran who is asserting a claim based on clear and unmistakable error is not represented by a lawyer, much less specificity is required.<sup>32</sup> In such cases, "the VA must

---

28. *Simmons v. Principi*, 17 Vet. App. 104, 114 (2003).

29. *Andrews v. Nicholson*, 421 F.3d 1278, 1282-83 (Fed. Cir. 2005).

30. *Robinson v. Shinseki*, 557 F.3d 1355, 1359-62 (Fed. Cir. 2009).

31. *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

32. *Id.*



give a sympathetic reading to the veteran's filings in that earlier proceeding to determine the scope of the claims."<sup>33</sup>

In *Szemraj v. Principi*, the United States Court of Appeals for the Federal Circuit held that the duty to fully and sympathetically develop claims applies to all claims.<sup>34</sup> In this regard, federal courts require, with respect to all pro se pleadings, that the VA give a sympathetic reading to the veteran's filings.<sup>35</sup> In *Acciola v. Peake*, the Court held

that *Andrews* does not shift the burden onto the Secretary [of Veterans Affairs] to imagine ways in which the original decision might [have been] defective. Rather a sympathetic reading of a [clear and unmistakable error] motion requires the Secretary [of Veterans Affairs] to fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error with the underlying decision.<sup>36</sup>

It is crucial to note that if a veteran files a reopened claim based on new and material evidence, the earlier original effective date for compensation or pension benefits, established by the date of filing of the initial claim for compensation or pension benefits at the appropriate VA Regional Office, is no longer in effect. Upon the filing of such a reopened motion for compensation or pension benefits based upon new and material evidence, is reconsidered by the VA Regional Office rating board de novo, (meaning in its entirety), and the newly submitted evidence is evaluated by the VA Regional Office rating board on the premise as to whether the newly submitted evidence is in fact new and material evidence, which, when considered in light of all of the evidence contained in the veteran's claims folder, would change the outcome of the claim for compensation and pension benefits, and a award of service connected VA compensation or pension benefits would be appropriate and

---

33. *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

34. *Id.*

35. *See, e.g., Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001).

36. *Acciola v. Peake*, 22 Vet. App. 320, 326-27 (2008).

granted. It must be emphasized that the effective date for the award of monetary benefits based on the new and material evidence would be the date of the filing of the reopened claim.

Of utmost importance, the veteran must be aware that any motion for reconsideration of an adverse BVA decision, filed during the same time that judicial proceedings are ongoing at the United States Court of Appeals for Veterans Claims, renders the BVA decision non-final, and thus renders the judicial proceedings moot on the basis of a lack of finality of the BVA decision, and failure to exhaust administrative remedies necessary for the United States Court of Appeals for Veterans Claims to have subject matter jurisdiction. The devastating effect of the mere filing of a motion for reconsideration of an adverse BVA decision cannot be understated.

Many unrepresented veterans are simply not aware of the adverse and traumatic impact such a motion for reconsideration of a BVA decision can have on judicial proceedings which have been ongoing for months at the United States Court of Appeals for Veterans Claims. For example, if the veteran or his spouse files a letter addressed to the BVA, merely asking for reconsideration of the adverse final BVA decision currently pending action at the United States Court of Appeals for Veterans Claims, the BVA immediately becomes non-final, and the Court action is immediately halted on the basis that the reconsideration of the BVA decision renders that decision non-final and the United States Court of Appeals for Veterans Claims action becomes moot. The counsel for the Secretary of Veterans Affairs will immediately file a motion to dismiss the appeal with prejudice as being moot, based on the fact that the United States Court of Appeals for Veterans Claims lacks subject matter jurisdiction due to the filing of the motion for reconsideration of the adverse BVA decision. The United States Court of Appeals for Veterans Claims action will be summarily dismissed with prejudice, meaning that the current proceedings before the Court cannot be reopened and readjudicated based on the same facts and arguments in the future and the case is closed.

On the other hand, a clear and unmistakable error claim is a difficult claim to win. The United States Court of Appeals for Veterans Claims has defined clear and unmistakable error by stating the veteran must show:

(1) that either the facts known at the time [of the decision, which are the basis for attack on appeal] were not before the adjudicator or the law then in effect was incorrectly applied, (2) that an error occurred based on the record and the law that existed at the time the decision was made, and (3) that had the error not been made, the outcome would have been manifestly different.<sup>37</sup>

This applies to both clear and unmistakable error claims pertaining to final VA Regional Office rating decisions and clear and unmistakable error in a BVA decision.<sup>38</sup>

In this regard, the elderly veteran is faced by a cumbersome, time consuming VA claims adjudication process from the time of the filing of his initial claim at the appropriate VA Regional Office, up to and including the appellate level at the Board of Veterans Appeals and the United States Court of Appeals for Veterans Claims. The elderly veteran is oftentimes faced with having to locate and submit evidence, much of which is impossible to discover or has been destroyed, to substantiate his or her claims for VA disability and pension compensation benefits. Furthermore, on numerous occasions, an elderly veteran will try to reopen his final VA initial claim by attempting to submit new and material evidence, which in fact destroys the earlier effective date for the receipt of monetary benefits, which date is established at the time of the filing of the initial claim for VA compensation and pension benefits at the appropriate VA regional office. As set forth above, elderly veterans will file a motion for reconsideration of the final Board of Veterans Appeals decision on appeal to the United States Court of Appeals for Veterans Claims, thus stripping the United

---

37. *Grover v. West*, 12 Vet. App. 109, 112 (1999).

38. See, e.g., *Bouton v. Peake*, 23 Vet. App. 70, 72 (2008); *Grover*, 12 Vet. App. at 112; *Russell v Principi*, 3 Vet. App. 310, 313-314 (1992).

States Court of Appeals for Veterans Claims of subject matter jurisdiction, rendering the judicial proceedings moot, since the underlying Board of Veterans Appeals decision becomes non-final, under the principles of exhaustion of administrative remedies. With a statement as simple as "Please reconsider my BVA decision," the elderly veteran does not realize the devastating effects such an action has at the VA Regional Office, Board of Veterans Appeals, and the United States Court of Appeals for Veterans Claims.

In many instances, although extremely difficult to prove, a claim of clear and unmistakable error is the best avenue to take in trying to reopen and readjudicate a prior final VA Regional Office rating decision, while at the same time preserving the earlier effective date established when the original initial claim was filed for service connected VA compensation or pension benefits.

The VA has created a non-adversarial process, but this is not always how the process seems to work.<sup>39</sup> It is often difficult for a lay person to navigate through the process, and a lawyer would be helpful to the claimant. The Veterans' Choice of Representation and Benefits Enhancement Act of 2006, 38 U.S.C. §§ 5902-5905, allows attorneys to charge for services after the VA rating board at the VARO level has denied a veteran's initial or reopened claim for benefits.<sup>40</sup> The attorney cannot charge attorney's fees during the initial fact-finding portion of the claims process.<sup>41</sup> When the original claim is denied, a claimant needs to submit new and material evidence in order for the claim to be considered a reopened claim.<sup>42</sup> If new and material evidence is submitted, the claimant will not be able to preserve the effective date and therefore will not be entitled to receive the full amount of back pay owed.<sup>43</sup> Since the process is non-

---

39. Craig M. Kabatchnick, *After the Battles: The Veterans' Battle With the VA*, 35 A.B.A. HUM. RTS. 13, 16 (2008).

40. *Id.* at 13-14.

41. *See id.* at 14.

42. *Id.* at 15.

43. *Id.*

adversarial, the VA has a statutory duty to assist the veteran.<sup>44</sup> The duty to assist includes aiding the veteran in locating service records and identifying what information is still missing, but many times it is on the veteran to locate the records and required evidence for their claim.<sup>45</sup>

Because the VA has a huge backlog of unresolved, unadjudicated claims, it sometimes skips crucial steps in the processing of these claims. These errors often adversely affect the fairness of the adjudication process. As a result, many claims that finally reach the Board of Veterans Appeals or the Court of Appeals for Veterans Claims are remanded because the VA failed to satisfy some of its statutory duties. . . . This is because the regional offices are evaluated by how many claims they process and how quickly they process claims.<sup>46</sup>

This process is hard to navigate alone. Elderly veterans also face several obstacles when attempting to obtain VA benefits.

#### LACK OF TRANSPORTATION

"[T]he nation's average age has been increasing steadily for the past 35 years . . .<sup>47</sup> [B]y the year 2020, between 17 and 20 percent of the entire U.S. population will be over 65, representing more than 50 million Americans. . . .<sup>48</sup> [U]ntil the 1950s, large portions of our elderly population lived in urban areas and were able to take advantage of mass transit systems to maintain mobility.<sup>49</sup> With the exodus from the cities to the suburbs in the 1950s and 1960s, however, most Americans assumed the responsibility for their own transportation needs."<sup>50</sup> As suburban populations age, they will become more incapable of transporting

---

44. 38 U.S.C. § 5103A (2006).

45. *Id.*

46. Jablow, *supra* note 2, at 31-32.

47. Joseph F. Coughlin & Annalynn Lacombe, *Transportation and Our Aging Population: Volpe Center Helps Shape Future Policy*, VOLPE JOURNAL, (Spring 1997), <http://www.volpe.dot.gov/infosrc/journal/spring97/aging.html>.

48. *Id.*

49. *Id.*

50. *Id.*

themselves.<sup>51</sup>

According to Volpe Center research, more than 75 percent of today's elderly live in suburban areas where the most widely available transportation option is the private automobile. . . . [A]ccording to a 1995 study produced for the Congress of New Urbanism, 82 percent of our elders live in detached, single-family homes. . . .<sup>52</sup>

In order to obtain benefits from the VA, the veteran will often be required to go to the VA offices and hospitals to meet with a representative during the crucial initial fact finding stage, to obtain a physical from a VA doctor, or to obtain treatment from a VA clinic. The VA does not provide transportation to these facilities. However, under 38 C.F.R. § 21.154, "[a] veteran, who because of the effects of disability has transportation expenses in addition to those incurred by persons not so disabled, shall be provided a transportation allowance to defray such additional expenses."<sup>53</sup> This allowance for transportation expenses is determined by a case manager.<sup>54</sup> A relative of the veteran is not eligible to be reimbursed.<sup>55</sup> Transportation to the VA facilities and clinics is not covered by 38 C.F.R. § 21.154, unless it is an additional expense by a disabled veteran; therefore, it does not apply to all veterans.<sup>56</sup> Other veterans are also eligible for travel reimbursement. Under 38 C.F.R. § 70.10,

[a] veteran who travels to or from a VA facility or VA-authorized health care facility in connection with treatment or care for a service-connected disability[,] . . . [a] veteran with a service-connected disability rated at 30 percent or more who travels to or from a VA facility or VA-authorized health care facility for examination, treatment, or care for any condition[,] . . . [a] veteran who travels to a VA facility or VA-authorized health care facility for a scheduled compensation and pension

---

51. *Id.*

52. *Id.*

53. 38 C.F.R. § 21.154(a) (2009).

54. *Id.* § 21.154(d).

55. *Id.* § 21.154(e).

56. *Id.* § 21.154(a).

examination[.]

and other veterans qualify to obtain travel reimbursement.<sup>57</sup> "[T]he Secretary may pay the actual necessary expense of travel (including lodging and subsistence), or . . . an allowance based upon mileage (at a rate of 41.5 cents per mile)."<sup>58</sup>

"For veterans living in rural areas, travel to obtain medical care from Department of Veterans Affairs, Veterans Health Administration (VHA) facilities can be distant, time consuming, and challenging."<sup>59</sup> One such example of this is the case of Jim Massey.<sup>60</sup> Massey's wife reports taking Mr. Massey "to 69 doctor appointments in 2008 alone."<sup>61</sup> The VA notified Massey by mail "about when and where to appear next."<sup>62</sup> The VA warned Massey "[f]ailure to report for any scheduled examination could have a detrimental effect on the outcome of [his] claim."<sup>63</sup> Massey reports that he travelled 240 miles for a VA examination and they only measured the length of his scars.<sup>64</sup> One study has revealed that an

[i]ncreased distance to healthcare treatment locations has been shown to influence care-seeking behavior, having a negative impact on outpatient visits by elderly veterans, outpatient and inpatient care for veterans with spinal cord injuries and disorders, outpatient care following myocardial infarction, aftercare following inpatient substance abuse treatment and continuity of care for veterans with serious mental illness.<sup>65</sup>

The remedy for the lack of transportation obstacle is to

---

57. *Id.* § 70.10(a)(1), (3).

58. 38 U.S.C. § 111(a) (2006), amended by Pub. L. 111-163, § 305(a)(1) (2010) (substituted "at a rate of 41.5 cents per mile," for "traveled").

59. Benjamin L. Schooley et al., *Rural Veteran Access to Healthcare Services: Investigating the Role of Information and Communication Technologies in Overcoming Spatial Barriers*, PERSP. HEALTH INFO. MGMT., 1 (Spring 2010) [http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1\\_046927.pdf](http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_046927.pdf).

60. Amanda Carpenter, *Veteran Benefits Entangled in Heaping Red Tape*, WASH. TIMES, Dec. 31, 2009, at A1.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Schooley, *supra* note 59, at 1-2.

utilize transportation assistance programs. Many states have taken to providing these assistance programs to their veterans. One such program, located in New Jersey, is called Disabled American Veterans Chapter 44 ("Disabled American Veterans").<sup>66</sup> Disabled American Veterans caters to veterans desiring to attend Delaware or Philadelphia Veteran Hospitals.<sup>67</sup> Disabled American Veterans utilizes volunteers to transport veterans to appointments.<sup>68</sup> In order to participate, veterans are required to make an appointment two weeks in advance as well as arrive at a pickup point.<sup>69</sup> Disabled American Veterans does not provide door-to-door service.<sup>70</sup> Programs such as Disabled American Veterans do not make the obstacle of lack of transportation obsolete, but they do help to ease the problem.

Another solution to the lack of transportation for elderly veterans is the use of information technology to treat elderly veteran patients.<sup>71</sup> A study was performed with a purpose of exploring veterans' and United States Department of Veterans Affairs (VA) practitioners' perceptions about the utility of information technology in overcoming spatial barriers to receiving healthcare.<sup>72</sup>

At least one in four respondents reported that travel considerations impacted their decision to go to medical appointments. . . . For medical appointments that were deemed routine, for a chronic condition, or for a prescription refill, the percentage of participants who reported that their decision to attend a VA facility was impacted was higher than the percentage who reported an impact on their decision to attend a non-VA facility.<sup>73</sup>

---

66. Disabled American Veterans Chapter 44, <http://www.dav44.com/2301.html> (last visited Oct. 25, 2010).

67. Disabled American Veterans Chapter 44, <http://www.dav44.com/15001.html> (last visited Oct. 25, 2010).

68. *Id.*

69. *Id.*

70. *Id.*

71. Schooley, *supra* note 59, at 6.

72. *Id.* at 2.

73. *Id.*



The results of the study revealed that "23.6 percent [of the veterans] rely on friends, family members, or the [Disabled American Veterans] van service for their transportation, highlighting the need to better understand the role of various transportation modes and associated costs for healthcare travel."<sup>74</sup>

The Department of Veterans Affairs is also recognizing the large number of veterans that are unable to obtain medical care due to their living in a rural area without access to the VA healthcare facilities. "For 2011, [the] VA is seeking \$250 million to strengthen access to health care for 3.2 million veterans enrolled in VA's medical system who live in rural areas. Rural outreach includes expanded use of home-based primary care and mental health."<sup>75</sup> The VA is seeking to implement a "telehealth" program which "links patients and health care providers by telephones and includes telephone-based data transmission."<sup>76</sup> The telehealth program will ideally be granted additional funding in the upcoming year; it already cares for "35,000 patients and is the largest program of its kind in the world."<sup>77</sup>

#### **"VIRTUAL CLASSROOM" BROADBAND TECHNOLOGY**

To assist with the problem of providing legal services to the poor and underrepresented throughout the state of North Carolina, North Carolina Central University School of Law ("NCCU") received a grant of nearly \$2 million in federal stimulus funds to upgrade broadband service while expanding access to its legal education programs. The \$1.9 million will underwrite a project that uses videoconferencing to provide

---

74. *Id.* at 6.

75. U.S. DEP'T VETERAN AFFAIRS, WHITE HOUSE SEEKS \$125 BILLION FOR VETERANS IN 2011 HOMELESSNESS, CLAIMS INCREASES AND ACCESS - PRIORITIES FOR VA BUDGET (Feb. 1, 2010), <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1848>.

76. *Id.*

77. *Id.*

low-income residents greater access to legal services. It will extend classes to twenty-two legal assistance sites across North Carolina and to four other state universities: Elizabeth City State University, Winston-Salem State University, North Carolina A&T State University and Fayetteville State University. The project also includes legal writing seminars for undergraduates to better prepare them for law school and increase minority representation in the legal profession. In essence the grant will help NCCU bridge the technological divide and bring legal education and services to North Carolina students and residents. In all, the U.S. Commerce Department's National Telecommunications and Information Administration and the U.S. Department of Agriculture's Rural Utilities Service are administering a nearly \$7 billion Recovery Act initiative to expand access to broadband services. Broadband technology can not only expand economic and educational opportunities, but it can also make the justice system more accessible to the public.

With the assistance of the "Virtual Classroom" at NCCU School of Law, the potential for reaching out and expanding our elderly veteran's outreach capabilities is absolutely outstanding statewide. The goal of this grant is to establish a "Virtual Classroom" for use in expansion into other states nationwide. We anticipate establishing in the very near future satellite offices in several sister universities located throughout in the state such as Fayetteville State University and Elizabeth City State University. Another source for outreach to elderly veterans will be the establishment of broadband capabilities at Legal Aid of North Carolina offices located statewide, especially in close proximity to military and VA facilities.

Furthermore, in the very near future, the NCCU Veterans Law Program, along with the highly respected NCCU School of Law information technology team, will begin initiating broadband hook-ups with all the VA medical facilities statewide, thus enabling elderly veterans, who are being treated for disabilities on both an outpatient and inpatient basis, to

consult with myself and a large team of trained students, regarding all issues affecting elderly veterans in the VA claims adjudication process. This encompasses educating veterans, especially elderly and poor veterans from poor, remote, and rural areas in the state of North Carolina, including those elderly veterans who are receiving inpatient and outpatient care at VA medical centers statewide, as to the variety of VA benefits available from the Department of Veterans Affairs, such as nursing home care, as well as fiduciary, burial, educational and rehabilitation benefits.

NCCU School of Law's "Virtual Classroom" broadband initiative is intended to expand the clinical program's outreach to include rural, under-reached areas, which in turn will be of immediate assistance to all elderly veterans residing in the state of North Carolina. While serving as a model for the rest of the nation, the NCCU School of Law "Virtual Classroom" will include positive expansion of broadband access, utilizing North Carolina's historically black campuses, thus creating wonderful possibilities for outreach to elderly veterans, spouses, widows and their children who live in remote rural areas within the state of North Carolina.

While the "Virtual Classroom" is not solely a veteran or military program, because the NCCU Veterans Law Program is but one of many clinical programs firmly established and available as part of NCCU School of Law's broad-based, top-ranked clinical program, the effect of this "Virtual Classroom" broadband system will inevitably have a profound effect on outreach to elderly veterans throughout the state of North Carolina. Because of the strong connection this program will have at VA medical facilities statewide, especially in conjunction with the newly enacted statewide VA medical center's rural outreach initiative being implemented at VA medical centers statewide, NCCU School of Law's "Virtual Classroom" broadband technology initiative will have a strong, positive

elderly veteran component to it.<sup>78</sup>

### DELAY IN THE VA PROCESS

The VA is not known for its quick claim turnaround for veterans. The largest problem with the length of time and slow turnaround to obtain benefits for an elderly veteran is that for these veterans, time is not always on their side. “[I]f a veteran dies with his or her case under appeal, the case dies, too. In the past decade, more than 13,700 veterans died while their cases were in some stage of the [VA claims adjudication process including the] appeals process.”<sup>79</sup> The other significant problem for elderly veterans with a time delay is that unless they have an eligible family member to claim the money, when they die the money simply stays in the United States Treasury.<sup>80</sup> “Compensation and disability claims for benefits are now backlogged by over 600,000 cases, with veterans waiting six to nine months for initial claims processing.”<sup>81</sup> The backlog of claims and delays is “due to the influx of new claims being processed by returning Iraq and Afghanistan veterans, combined with an existing cohort of veterans who have yet to overcome the bureaucratic hurdles of processing their claim.”<sup>82</sup> The average wait time for an initial decision is six months, and the wait time is an average of 4.4 years for a decision if appealing the decision to the Board of Veterans Appeals.<sup>83</sup>

One of the best examples of how the VA process can potentially take an extensively long period of time to reach the

---

78. See NORTH CAROLINA CENTRAL UNIVERSITY SCHOOL OF LAW, <http://web.nccu.edu/law/> (last visited Nov. 7, 2010).

79. Chris Adams & Alison Young, *V.A. Delays Put Veterans in Jeopardy Thousands Die Without Benefits*, KAN. CITY STAR, March 6, 2005, at A1.

80. *Id.*

81. Amy N. Fairweather, *Compromised Care: The Limited Availability and Questionable Quality of Health Care for Recent Veterans*, 35 A.B.A. HUM. RTS. 2, 2 (2008).

82. *Id.*

83. Michael Serota, Op-Ed., *Open Forum: Justice Delayed is Justice Denied*, S.F. CHRON., June 1, 2010, [http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry\\_id=64633](http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=64633).

final correct decision is the case of David Best. The Best case was litigated by the North Carolina Central University School of Law. Best fought the VA for benefits for almost 13 years and captured his feelings about the process in multiple news articles stating, "I feel like the VA is waiting for us veterans to die."<sup>84</sup> Fortunately, David Best did eventually win his battle with the VA.<sup>85</sup> "Best had battled the Veterans Administration over disability benefits for a service-related injury. [T]he VA regional office in Winston-Salem denied his claims eight times. . . ."<sup>86</sup> Best developed a pain in his knee while he was serving in the Army and the pain continued after his discharge.<sup>87</sup> Best attempted to get treatment from the VA, but they were unable to find the source of his pain.<sup>88</sup> Best then went to a private doctor, who diagnosed him "with degenerative arthritis of the left hip."<sup>89</sup> Best claimed that his award in compensation for disability benefits totaled over \$300,000.<sup>90</sup>

The remedy for this time delay is to prepare the veteran for an extensive process. The veteran can also ensure the most immediate response by filling out all paperwork correctly, answering all questions completely, and making their best effort to locate necessary information. It is important for the veteran to continually remain proactive instead of reactive in the VA process.

---

84. Lisa Sorg, *Veteran David Best Finally Wins His Appeal*, INDEP. WKLY., October 28, 2009, <http://www.indyweek.com/indyweek/veteran-david-best-finally-wins-his-appeal/Content?oid=1230680>; Lisa Sorg, *'The VA is Waiting for Us to Die': A Soldier Battles a System Stacked Against Him*, INDEP. WKLY., March 14, 2007, at 5, 7.

85. Lisa Sorg, *Veteran David Best Finally Wins His Appeal*, INDEP. WKLY., October 28, 2009, <http://www.indyweek.com/indyweek/veteran-david-best-finally-wins-his-appeal/Content?oid=1230680>.

86. *Id.*

87. Lisa Sorg, *'The VA is Waiting for Us to Die': A Soldier Battles a System Stacked Against Him*, INDEP. WKLY., March 14, 2007, at 5.

88. Sorg, *supra* note 85.

89. *Id.*

90. *Id.*

### LACK OF SERVICE RECORDS

In order [for a veteran] to establish a claim for service connection, the [veteran] must show (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service; and (3) medical evidence of a nexus between the claimed in-service injury or disease and the current disability.<sup>91</sup>

"[T]he nexus requirement cannot be satisfied fully without some credible evidence of an in-service incurrence."<sup>92</sup> Often times, veterans demonstrate this in-service incurrence through the use of service records.

Under 38 U.S.C. § 5103A, the VA is under a duty to assist claimants in obtaining necessary records for the processing of their claims.<sup>93</sup> Under the duty to assist, the VA is required to notify the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim."<sup>94</sup> The VA has a "duty to exercise greater diligence in assisting the appellant with the development of evidence in support of his claim in the event that his medical records were lost while in VA custody."<sup>95</sup> "[W]hen [the] VA is unable to locate a claimant's records, it should advise him to submit alternative forms of evidence to support his claim and should assist him in obtaining sufficient evidence from alternative sources."<sup>96</sup> These alternative sources should include buddy statements from others who served with the claimant.<sup>97</sup> "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit

---

91. *Washington v. Nicholson*, 19 Vet. App. 362, 367 (2005).

92. *Id.*

93. 38 U.S.C. § 5103A(a)(1) (2006).

94. *Id.* § 5103(a).

95. *Washington*, 19 Vet. App. at 369.

96. *Id.* at 370.

97. *Id.*

of the doubt to the claimant.”<sup>98</sup> “[C]aselaw does ‘not establish a heightened ‘benefit of the doubt,’ only a heightened duty of the Board to consider applicability of the benefit of the doubt rule, to assist the claimant in developing the claim, and to explain its decision when the veteran’s medical records have been destroyed.’”<sup>99</sup>

One problem elderly veterans encounter in locating their service records is that their records are not always available. On July 12, 1973, the National Personnel Records Center (NPRC) located in St. Louis, Missouri experienced a fire that destroyed “16-18 million Official Military Personnel Files.”<sup>100</sup> The NPRC does not have any copies of the records that were destroyed, does not have microfilm of the records destroyed, and does not have an index of the records destroyed.<sup>101</sup> In order for the VA to effectively meet their duty to assist, the VA must help the veteran obtain any records the government agencies may have as well as advise them of other sources of documentation that may be used to establish an in-service connection.<sup>102</sup> However, the VA “is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.”<sup>103</sup>

The remedy for lack of service records is for veterans to be proactive in their own case. Veterans should request a copy of their case file and then should request records from various record repositories. It is important to locate the veteran’s claims folder at the beginning of the claim filing process.<sup>104</sup> Ideally, a veteran should physically go to the file and make a copy because

---

98. § 5107(b).

99. *Cromer v. Nicholson*, 19 Vet. App. 215, 217-18 (2005) (quoting *Russo v. Brown*, 9 Vet. App. 46, 51 (1996)).

100. NAT’L ARCHIVES & RECS. ADMIN., THE 1973 FIRE AT THE NATIONAL PERSONNEL RECORDS CENTER (ST. LOUIS, MO), <http://www.archives.gov/st-louis/military-personnel/fire-1973.html> (last visited Oct. 25, 2010).

101. *Id.*

102. *Washington v. Nicholson*, 19 Vet. App. 362, 370 (2005).

103. 38 U.S.C. § 5103A(a)(2) (2006).

104. Lisa Petersen, *Obtaining Military Pension Files from the VA*, KINQUEST, <http://www.kinquest.com/usgenealogy/va.php> (last updated June 18, 2006).

a request for a copy of the claims folder could take up to or more than one month to process and receive the copy.<sup>105</sup>

When attempting to locate service records, the veteran should ensure that the VA has notified each of the record repositories, including the National Personnel Records Center (NPRC), the United States Army and Joint Services Records Research Center (JSRRC), the National Archives and Record Administration (NARA), and the Naval Historical Center. The NARA is the official record repository for military personnel discharged from the Navy, Army, U.S. Marine Corps, and Coast Guard.<sup>106</sup> The JSRRC works as an agent "to conduct military records research in support of Veterans' inquiries related to Post Traumatic Stress Disorder (PTSD) and Agent Orange exposure disability claims."<sup>107</sup> The Naval Historical Center is the official center for the U.S. Navy historical information, including deck logs and ship history.<sup>108</sup> While requesting records, the veteran should keep in mind that pay vouchers are an adequate alternative resource to service records.<sup>109</sup>

If the veteran cannot, after persistent attempts locate service records, the veteran should attempt to use alternate forms of evidence. Under 38 C.F.R. § 3.307(b), to prove an injury in service, the "factual basis may be established by medical evidence, competent lay evidence, or both."<sup>110</sup> A veteran can use lay evidence to prove their claim, "[a]s long as the evidence is 'satisfactory,' consistent with the 'circumstances of service,' it

105. *Id.*

106. NAT'L ARCHIVES & RECS. ADMIN., MILITARY SERVICE RECORDS AND OFFICIAL MILITARY PERSONNEL FILES (OMPFs, DD FORM 214), <http://www.archives.gov/veterans/military-service-records/> (last visited Oct. 25, 2010). The NARA accepts requests for records, which can be done online at [www.archives.gov](http://www.archives.gov), or by filling out a form and mailing it to 9700 Page Avenue, St. Louis, Missouri 63132.

107. U.S. ARMY: REC. MGMT. & DECLASSIFICATION AGENCY, JOINT SERVICES RECORDS RESEARCH CENTER PROGRAMS, <https://www.rmda.army.mil/programs/jsrrc.shtml> (last visited Oct. 25, 2010).

108. *Frequently Asked Questions*, NAVAL HIST. & HERITAGE COMMAND, [http://www.history.navy.mil/fleet\\_veterans.html](http://www.history.navy.mil/fleet_veterans.html) (last visited Oct. 25, 2010).

109. NAT'L ARCHIVES & RECS. ADMIN., ALTERNATE RECORD SOURCES, <http://www.archives.gov/st-louis/military-personnel/alternate-record-sources.html> (last visited Oct. 25, 2010).

110. *Cahall v. Derwinski*, 3 Vet. App. 4, 5 (1991).



can prevail in the absence of any official record, and the evidence is sufficient to establish service connection."<sup>111</sup> If unable to find the necessary information in the service records, the veteran should also look to present evidence such as

(1) statements from doctors who have provided treatment for the disability at issue over a prolonged period of time; (2) submission reports from board-certified medical doctors who specifically specialize in the field of medicine for which the claimed disability is at issue; and (3) articles and citations from recognized medical treatises, buddy statements, morning reports, evidence of citations, or other proof to help the veteran develop his or her claim for disability compensation or pension.<sup>112</sup>

#### LACK OF BUDDY STATEMENTS

The buddy statement is an extremely useful piece of evidence. Many elderly veterans lack the opportunity to obtain buddy statements because other military personnel they served with are either no longer living or suffer from memory loss, and they cannot provide an adequate statement. Depending on the type of disability the veteran is attempting to claim, the standard for the types of evidence presented will vary. "If the evidence establishes that the veteran engaged in combat with the enemy and his claimed stressor is related to that combat, the veteran's lay testimony alone generally is sufficient to establish the occurrence of the claimed in-service stressor."<sup>113</sup> This establishes that sometimes the veteran's own testimony can be an invaluable source of evidence. "If, however, the claimed stressor is not combat related, its occurrence must be corroborated by credible supporting evidence. . . . Corroboration does not require, however, 'that there be corroboration of every detail including the appellant's personal participation in the

---

111. *Russo v. Brown*, 9 Vet. App. 46, 51 (1996).

112. *Kabatchnick*, *supra* note 39, at 15.

113. *Daye v. Nicholson*, 20 Vet. App. 512, 515 (2006).

[activity].”<sup>114</sup> Veterans can testify about “factual matters of which [they] ha[ve] first-hand knowledge.”<sup>115</sup> However, “a lay witness . . . cannot offer evidence that requires medical knowledge, such as causation or etiology of a disease or injury.”<sup>116</sup>

If the veteran has certificates or medals from service, these would also be helpful in establishing service connection. However, it cannot be held against veterans if they cannot produce any medals or certificates from service.<sup>117</sup> “The lack of a Purple Heart Award proves only that this appellant did not suffer a wound in combat; it simply has no bearing on the issue of whether, as he claims, he participated in bringing fire upon the enemy or was fired upon.”<sup>118</sup>

In *Stozek v. Brown*, the veteran’s records were destroyed in the 1973 NPRC fire and initially the claim was denied.<sup>119</sup> The claim was remanded when the veteran submitted six buddy statements from people who had served with him and could attest to the fact that he was in the hospital.<sup>120</sup> The VA did not provide an adequate reason as to why it did not take the buddy statements into account, and the court found that “[m]ere conclusory statements regarding the evaluation of the evidence, including the applicability of the benefit-of-the-doubt rule, will not suffice.”<sup>121</sup> The case was remanded for a proper adjudication with adequate time being spent on considering the buddy statements.<sup>122</sup> Without a buddy statement, the veteran should ensure he or she has made every attempt at locating all service records, including pay-stubs, and has testified to each piece of evidence about which he or she has first-hand knowledge.

---

114. *Id.* (quoting *Suoizzi v. Brown*, 10 Vet. App. 307, 311 (1997)).

115. *See* *Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005).

116. *Id.* at 368 (quoting *Espiritu v. Derwinski*, 2 Vet. App. 492, 494 (1992)).

117. *See* *Daye*, 20 Vet. App. at 517.

118. *Id.*

119. *Stozek v. Brown*, 4 Vet. App. 457, 458 (1993).

120. *Id.*

121. *Id.* at 461.

122. *Id.*

## LACK OF MENTAL HEALTH

"Nearly 20 percent of those who are 55 years and older experience mental disorders that are not part of normal aging."<sup>123</sup> The most common disorders among this age group are "anxiety, severe cognitive impairment, and mood disorders."<sup>124</sup> Many elderly veterans fighting these disorders as well as normal aging disorders could encounter an incompetency hearing. An incompetent veteran "is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation."<sup>125</sup> At the incompetency hearing there is a presumption in favor of competency.<sup>126</sup> "Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency."<sup>127</sup>

The VA Regional Office makes the initial determination of whether veterans are competent to handle their affairs, and then, a Veteran's Service Officer (VSO) is informed of possible need for a fiduciary.<sup>128</sup> The VSO is responsible for collecting information on the veteran's social, economic, and industrial impairment; if the VSO agrees with the incompetency determination, a fiduciary is appointed, but if the VSO disagrees with the incompetency determination, all evidence is forwarded to the rating agency, accompanied with a statement of conclusion, at which point the regional office reconsiders its prior decision.<sup>129</sup>

Once a veteran is declared incompetent it can be extremely

---

123. AM. ASS'N FOR GERIATRIC PSYCHIATRY, GERIATRICS AND MENTAL HEALTH – THE FACTS, [http://www.aagpgpa.org/prof/facts\\_mh.asp](http://www.aagpgpa.org/prof/facts_mh.asp) (last visited Oct. 25, 2010).

124. *Id.*

125. 38 C.F.R. § 3.353(a) (2009).

126. *Id.* § 3.353(d).

127. *Id.*

128. *Sanders v. Brown*, 9 Vet. App. 525, 529 (1996).

129. *Id.*

difficult to reverse the decision. In *Sanders v. Brown*, the veteran wanted to overturn his status of incompetence and presented evidence that

[he] believe[s] [he is] capable of handling [his] own funds or handling [his] check under supervision. All four doctors indicated in their report that [his] condition was in some form of remission. . . . [He] believe[s] [his] condition is stable, as [he] only take[s] a shot of prolixin once a month.<sup>130</sup>

The VA doctor examined Sanders and found him to be schizophrenic.<sup>131</sup> The VA doctor also found there was not enough evidence in his short examination of the veteran to override the incompetent status, even though the doctor admitted that someone who saw the veteran on a more regular basis would be in a better position to make the decision.<sup>132</sup>

The Veterans Service Center Manager is authorized to select and appoint . . . the person or legal entity best suited to receive Department of Veterans Affairs benefits in a fiduciary capacity for a beneficiary who is mentally ill (incompetent) or under legal disability by reason of minority or court action, and beneficiary's dependents.<sup>133</sup>

The Veterans Service Center Manager also determines the amount of payment the veteran is to receive each month.<sup>134</sup> Veterans' lay assertions that their conditions are getting better are not competent medical evidence to establish that they are not incompetent.<sup>135</sup> The court also held that "seeking to lift an incompetency determination must be viewed procedurally as similar to seeking an increased disability rating—that is, as a new claim."<sup>136</sup>

Many of the veterans are not given adequate ratings, and

---

130. *Id.* at 527.

131. *Id.*

132. *Id.*

133. 38 C.F.R. § 13.55(a) (2009).

134. *Id.* § 13.56(a).

135. *See Sanders*, 9 Vet. App. at 529.

136. *Id.* at 528.

the United States Department of Veterans Affairs provides them with a rating that does not provide enough compensation, yet the veterans are not in strong enough physical shape to work. The VA Disability Ratings for a veteran without dependents are as follows:<sup>137</sup>

<b>Rating Decision</b>	<b>Monthly Compensation</b>
10%	\$123.00
20%	\$243.00
30%	\$376.00
40%	\$541.00
50%	\$770.00
60%	\$974.00
70%	\$1,228.00
80%	\$1,427.00
90%	\$1,604.00
100%	\$2,673.00

In order for a veteran to be deemed unemployable due to disability, the veteran must have one disability rated at sixty percent or more, or, if two or more disabilities exist, the veteran must have at least one disability rated at forty percent and the additional disabilities must bring the combined rating to at least seventy percent.<sup>138</sup> "It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled."<sup>139</sup> In order for a veteran to obtain the best possible rating decision, the veteran should research his or her own conditions and not rely solely on the VA's answer.<sup>140</sup> The veteran also needs to

---

137. U.S. DEPT'T VETERANS AFF., VETERANS COMPENSATION BENEFITS RATE TABLES – EFFECTIVE 12/1/09, <http://www.vba.va.gov/bln/21/rates/comp01.htm> (last visited Oct. 25, 2010).

138. 38 C.F.R. § 4.16(a) (2009).

139. *Id.* § 4.16(b).

140. Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 That Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155, 1185 (2010).

ensure he or she is open and honest in all medical examinations with how this disability impacts his or her daily life.<sup>141</sup> “In the context of a claim, any reference to how the disability impacts the veteran’s daily life must be closely tied to the veteran’s reduced capacity to earn a living.”<sup>142</sup>

#### LACK OF KNOWLEDGE ABOUT POTENTIAL BENEFITS

A veteran has the option of applying for compensation and/or pension benefits. A veteran can qualify for both compensation and pension benefits, but the VA cannot pay both sets of benefits concurrently.<sup>143</sup> When the veteran files the initial claim, the claim can be considered for both compensation and pension benefits.<sup>144</sup> The VA will award the claim with the greater amount.<sup>145</sup> Both benefits are based on disability.<sup>146</sup> The biggest difference between the two is that pension benefits are part of a needs-based program, whereas compensation is not based on need or income. Compensation is “a monthly payment made by the Secretary to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.”<sup>147</sup> To be eligible for pension benefits, a veteran must have wartime service, low income, and total and permanent disability.<sup>148</sup> The total and permanent disability does not need to be “connected” to the period of the veteran’s military service, but cannot be based on the willful misconduct of the veteran.<sup>149</sup> As of September 17, 2001, veterans aged sixty-five years and over are conclusively presumed to be

---

141. *Id.*

142. *Id.*

143. 38 U.S.C. § 5304(a)(1) (2006).

144. 38 C.F.R. § 3.151(a).

145. *Id.*

146. 38 U.S.C. § 101(13), (15).

147. *Id.* § 101(13).

148. *Id.* § 1521(a), (d)(1), (j).

149. *Id.* § 1521(a).

permanently and totally disabled for the pension purposes.<sup>150</sup> Veterans seeking compensation benefits must connect their disability to the period of their military service.<sup>151</sup>

A veteran meets the service requirements of this section if such veteran served in the active military, naval, or air service— (1) for ninety days or more during a period of war; (2) during a period of war and was discharged or released from such service for a service-connected disability; (3) for a period of ninety consecutive days or more and such period began or ended during a period of war; or (4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.<sup>152</sup>

If a veteran qualifies, a veteran “may be entitled to educational benefits, home loans, free medical care, pension and disability compensation, and free burial in nationally run cemeteries.”<sup>153</sup> “Far too many veterans have little idea of the benefits to which they are entitled. The VA is also barred from advertising, which would be the most obvious way to inform veterans of available resources.”<sup>154</sup>

One of the biggest changes for the elderly veteran is the update to the presumed disability for Agent Orange.

A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.<sup>155</sup>

The term “Service in the Republic of Vietnam” is defined as actual service in-country, including service in the inland waterways, in Vietnam from January 9, 1962 through May 7, 1975, and “includes service in the waters offshore and service in

---

150. *Id.* § 1513(a).

151. *Id.* § 1521(j)(2).

152. *Id.* § 1521(j)(1)-(4).

153. Fairweather, *supra* note 82, at 2.

154. *Id.* at 5.

155. 38 C.F.R. § 3.307(a)(6)(iii) (2009).

other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.”<sup>156</sup> There is also not a standard length of time a veteran must have occupied Vietnam to create the presumption of exposure, however the veteran must have had 90 days of active service.<sup>157</sup> In order to take advantage of this presumption, the veteran must be able to prove that he stepped foot in Vietnam at some point for any length of time during the requisite time periods.<sup>158</sup> The presumption is helpful to veterans, but it can still be a struggle for veterans to prove they have stepped foot in Vietnam absent medical records or buddy statements.

The other significant update that affects the elderly veterans are the constant changes to the presumed list of disabilities. Under title 38 C.F.R. § 3.309 (2010) is a list of presumed disabilities.<sup>159</sup> If a veteran has one of these diseases, disabilities, chronic illnesses, or effects of radiation exposure, the disease will be presumed to be service connected.<sup>160</sup>

#### LACK OF DUE PROCESS IN THE CLAIMS ADJUDICATION PROCESS

The claims process is not perfect and many claimants experience red tape and delays. Due Process is “[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.”<sup>161</sup> The Due Process Clause of the Fifth Amendment guarantees that an individual will not “be deprived of life, liberty, or property, without due process of law.”<sup>162</sup> Denial of due process will be conceded by the VA

(1) [w]hen the appellant was denied his or her right to

---

156. *Id.*

157. *Id.* § 3.307(a)(1).

158. *See* Haas v. Peake, 525 F.3d 1168, 1172 (Fed. Cir. 2008).

159. § 3.309(a)-(e).

160. *Id.* § 3.309.

161. BLACK’S LAW DICTIONARY 575 (9th ed. 2009).

162. U.S. CONST. amend. V.



representation through action or inaction by Department of Veterans Affairs or Board of Veterans' Appeals personnel, (2) [w]hen a Statement of the Case or required Supplemental Statement of the Case was not provided, and (3) [w]hen there was a prejudicial failure to afford the appellant a personal hearing.<sup>163</sup>

One of the most significant landmark cases recently decided was *Cushman v. Shinseki*.<sup>164</sup> In *Cushman*, the court held that the Due Process Clause protected a veteran's property interest in his or her disability benefits.<sup>165</sup> "Cushman served in a United States Marine Corps combat infantry battalion in Vietnam during the Vietnam War."<sup>166</sup> "[I]n Vietnam, a heavy sandbag fell on Mr. Cushman's back and damaged his spine."<sup>167</sup> Cushman received an honorable discharge in 1970.<sup>168</sup> "Mr. Cushman underwent four spinal surgeries to treat his injury and has received continuous pain medication."<sup>169</sup>

The BVA denied Cushman's claim and relied on medical evidence but did not state their reasons for denial.<sup>170</sup> The BVA relied on a document that had been altered from its original form.<sup>171</sup> "Mr. Cushman asserts that he was denied a full and fair hearing on the factual issues of his claim due to the presence of the altered medical record."<sup>172</sup> "It is well established that disability benefits are a protected property interest and may not be discontinued without due process of law."<sup>173</sup> The effects of *Cushman v. Shinseki* could prove to expand the due process requirement for veterans.

*Cushman* makes clear that a veteran whose claim for benefits was not adjudicated in a fundamentally fair manner—if, for

---

163. § 20.904(a)(1)-(3).

164. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

165. *Id.* at 1296.

166. *Id.* at 1292.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1293.

171. *Id.*

172. *Id.* at 1296.

173. *Id.*

example, the proceeding was prejudicially tainted by the admission of improper evidence or the suppression of favorable evidence—has a constitutional right to seek readjudication of the claim in a manner that satisfies due process.<sup>174</sup>

## CONCLUSION

The VA has claimed to create a non-adversarial process for claims adjudication for veterans.<sup>175</sup> This process has created multiple obstacles specifically for the elderly veterans. Each of these obstacles has a remedy that does not completely terminate the obstacle, but it does allow the veteran the opportunity to proceed in his or her claim. The largest obstacles in the way of the VA process for the elderly are (1) lack of transportation; (2) delay in the VA process; (3) lack of service records; (4) lack of buddy statements; (5) lack of mental health; (6) lack of knowledge about potential benefits; and (7) lack of due process in the claims process. These obstacles prevent elderly veterans who gave so much from getting the appropriate benefits to help them in the later stages of their lives. The VA process needs to undergo a comprehensive change;<sup>176</sup> until the process evolves, these obstacles will continue to stand in the way of elderly veterans attaining their benefits.

---

174. Eaton et al., *supra* note 146, at 1174.

175. Fairweather, *supra* note 82, at 4.

176. Mulhall, *supra* note 3, at 15.